

# AMERICAN LEGAL REALISM AND THE SENSE OF THE PROFESSION\*

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## I

The argument of this lecture can be summed up in four simple propositions:

First, we are all ultimately the creatures of our philosophies. We dance in patterns determined by our pasts, to tunes we hardly know we know. Our acts are governed by an anthology of principles, myths, illusions and memories which jostle together in our heads, and in our hearts. Sometimes, at rare moments in the history of civilization, if good philosophers ever actually did become Kings, the dominant working rules of a culture might be dignified as rational and consistent systems of ideas. Normally, they represent a far more human mixture of the sensible and the absurd. From time to time, as we have bitter reason to know, the springs of action have been demonic creeds of hatred and conquest, based on driving beliefs about the supremacy of race, or faith, or class, or nation. Whatever their philosophical quality, however comfortable or uncomfortable they make us, or others, we are possessed by our ideas. They determine how we see and respond to the circumstances of our lives. And through our responses, the notions in our minds in their turn help to shape the world in which we have our being.

The second step in my argument is that the influence of ideas on events is especially marked in the realms of law, which can never cease its striving for rule by "principle." American law and American lawyers today are products of a tradition of thought and experience which embraces several incompatible premises. This fact exposes our law, and the society which seeks to govern itself through law, to the tension of unresolved conflict. Anxieties about the nature of law, and about the propriety of the way in which our legal institutions are functioning, — and, most notably, in recent years, anxiety about the propriety of the modes of action of the Supreme Court of the United States — have exacerbated the tension which is inevitable in the normal operations of any living system of law. For legal institutions must always perform three functions which cause strain under the

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best of circumstances: They must endlessly adjust the formal, stated rules of law to the pace of social and moral change. They must seek to raise the level of social behavior, and of the law in practice, up to that of the accepted standards of law. And thirdly, the law fails in its most important function unless all its agencies strive, through their own approved procedures, and according to their accepted rules, to bring the standards of the law closer to those of the ideal for law cherished by those with authority to speak for our culture in stating its law.<sup>1</sup>

The third proposition I shall seek to defend is that the prevailing American philosophy of law — the largely unstated code by which in fact we live, as lawyers and as citizens — prescribes a standard of high social responsibility for lawyers as judges, advocates, counsellors, legislators and law professors. That standard is implicit in the view, which I believe is now rightly dominant in our culture, that law is not, in Blackstone's phrase, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong,"<sup>1a</sup> but rather a system of social order, an accepted procedure for making certain social decisions. Inescapably, the procedure of law must utilize general propositions and sets of propositions, the so-called "rules of law." Pound has described this "scientific element" in the law functionally as "a reasoned body of principles for the administration of justice . . . a means towards the end of law, which is the administration of justice. . . . Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation."<sup>2</sup>

And finally, in the fourth part of the lecture, I shall try to apply this conclusion to some concrete and ordinary problems to illustrate the kind of responsibilities I believe we have as American lawyers. I shall concentrate on two of the many kinds of dilemmas which arise when we seek to evaluate the performance of our legal institutions in the light of these standards: the work of the Supreme Court of the United States, and that of the organized bar. The contention of the fourth section will be that the Supreme Court of the United States has been meeting its responsibilities at a high level of accomplishment, on the average, making due allowance for the ebb and flow of the common-law process of adjudication and for the shortcomings of men even when they are Justices, but that the rest

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1. This proposition is discussed in ROSTOW, *PLANNING FOR FREEDOM* 363-64 (1959).

1a. 1 BLACKSTONE, *COMMENTARIES* \*44.

2. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

of the profession of law is not now rising to the challenge of its public responsibilities very well—certainly not well enough—and that in certain areas our performance is lamentably poor.

## II

I shall not linger long tonight on the first theme of my argument—that our lives are dominated, for better or for worse, by ideas as well as by economic interests, technologies and the impersonal tides of social change. A generation which has suffered the consequences of Hitler, and is only beginning to confront Marxism as a fighting faith, can hardly doubt the role of ideas in history. I do not mean to suggest that the steam engine and its successors did not revolutionize the context of our lives, nor that history can be interpreted without reference to science, economics, human stupidity, or the art and accident of war. Nor do I wish to propose, recalling Professor Sir Isaiah Berlin's brilliant metaphor, that the hedgehogs are right in seeing the world as a unitary vision, and the foxes are wrong in sensing the separateness and contradictions of social happenings.<sup>3</sup> What I do mean is that in the end, as Heine once said, the "proud men of action . . . are nothing but unconscious instruments of the men of thought." Holmes put it very well, celebrating Marshall's anniversary:

[T]his day marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped mediation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power. It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose.<sup>4</sup>

The thesis is often challenged, and it is hardly beyond debate. But I find it difficult to deny, especially in the United States, where the germinal ideas of the Declaration of Independence and of the Constitution have played such a central role in framing our destinies. The thought should be especially vivid in our minds now, as we commemorate the Civil War our fathers fought to vindicate the abstract and even mystical thought that the Union of the American people was indissoluble by the States.

## III

The power of men's loyalty to their ideas is nowhere so visible as in the law. Whether we view law through Blackstone's eyes or through Pound's, as readers of Austin or of Thurman Arnold, certain intractable features of the landscape are clear. We can think of

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3. BERLIN, *THE HEDGEHOG AND THE FOX* (1953).

4. HOLMES, *COLLECTED LEGAL PAPERS* 270-71 (1920).

law in terms of many competing and complementary definitions: as a code of rules laid down by a sovereign, a process of social decision, a prediction of when the public force will be invoked, a pattern of approved social behavior, more or less effectively acknowledged by courts and legislatures — the number of such formulae is almost infinite. Whatever the starting point or the end-product of our analysis, we cannot ignore the fact that the law is featured by rules, articulated and re-articulated in more or less abstract form, and that these rules play a part in the outcome of cases and other legal controversies. The art of generalization, we know, has an indispensable role in the legal process, and is an indispensable feature of law as an institution of order. This generalizing aspect of law derives from the basic moral principle, acknowledged by every legal system we know anything about, that similar cases should be decided alike. The principle of equality before the law is easy to recite, and infinitely difficult to apply. It lies behind the weight given to precedent in legal systems, and gives force to the yearning for certainty and predictability in law which each generation has expressed, in vain, since the beginnings of recorded time.

In the generation of lawyers and judges who prevailed in England and America about a hundred years ago, the rationalizing, system-building component of law became oppressive. Deference to precedent became not one wise principle among many in the growth of law, but a rigid and restrictive absolute, which is still considered to be at least the nominal rule of decision in England.<sup>5</sup> The men of that day, intoxicated by the notion of law as a science, freed at last of its religious past, began to think of it as a self-contained body of rational precepts. They treated its rules not as tentative hypotheses, advanced to explain shifting bodies of social behavior, but as fixed propositions, laws of nature and of "reason" in some magical sense, sustained by autonomous authority, and capable of surviving unchanged for indefinite periods of time. The so-called rules of law, which subsumed and organized groups and patterns of decisions, were invoked without reference to the purposes they had been called into being to serve, and without considering whether those ends were still appropriate. Orations at bar association meetings, and at the funerals of departed legal worthies, invoked the grandeur of "eternal principles" of law. The legal texts of the time, and the teaching in law schools, followed the same pattern. Whole areas of the law were reduced to the symmetry and consistency of logical order, with all their features clear, and clearly derived from two or three general propositions deemed self-evident. Thus the dream was revived of law as a code of rules, and no more, so that with a little effort we

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5. CROSS, PRECEDENT IN ENGLISH LAW (1961); WASSERSTROM, THE JUDICIAL DECISION (1961).

could achieve its restatement in books that would not fill a single shelf. Then judgment could be found, not made, and society could at long last enjoy a stable, certain and perfectly predictable legal order.<sup>6</sup>

I sometimes wonder whether the lawyers of the day really believed in the "mechanical jurisprudence" they professed, and against which Roscoe Pound's early articles inveighed with such vehemence. After all, we live by a philosophy of law even when we have no legal philosophers to tell us what it is, or when they describe it inaccurately. The centuries-old habits of the common law survived the strait-jacket of what Karl N. Llewellyn has recently called the Formal Style of thought about law. Professor Llewellyn describes the phenomenon, which is still too much with us, in these terms:

The Formal Style is of peculiar interest to us because it set the picture against which all modern thinking has played—call it, as of the last eighty or ninety years, "the orthodox ideology." That picture is clean and clear; the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability. "Principle" is a generalization producing order which can and should be used to prune away those "anomalous" cases or rules which do not fit, such cases or rules having no function except, in places where the supposed "principle" does not work well, to accomplish sense—but sense is no official concern of a formal-style court.<sup>7</sup>

No doubt the Formal Style of the age, and, perhaps more important still, the mediocrity and intense conservatism of many of the judges, had their consequences in the realm of affairs. Many cases were decided mechanically. The common law process of creative change, through which the law meets and molds the flow of social experience, was slowed up. The law became too static, too resistant to pressure from without, cut off from the sources of its vitality in the stuff of life.

The reaction of opinion was sharp, and explosive, and it has continued in various forms to our own time. The need for the struggle remains, for the old orthodox idea of law as a fixed body of received rules, divorced from policy, has a tenacious hold on the minds of men. The battle-cry of the counter-attack was Holmes' famous opening page of *The Common Law*, published in 1881, and still the rallying point, and point of beginning, for most phases of the struggle to recover and re-establish effective methods for pursuing the reform of law, and social reform through law.

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6. See C.H.S. FIFOOT, *JUDGE AND JURIST IN THE REIGN OF VICTORIA* (1959), for a witty and ironic account of the process, and its denouement.

7. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 38 (1960).

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.<sup>8</sup>

These views and their reception measured deep movements in American and European thought. Great man though Holmes was, he did not strike off these passages, and others of like tenor, wholly through private revelation. The view he took represented in large part a collision between the static notions of law which prevailed among lawyers at the time, and the revolutionary development of historical studies. By 1880, the German, French and English writers about history, sociology, and philology, after more than a century of cumulative effort, were beginning to transform our consciousness of the past, and of the nature of the social process. Holmes' thought owed much as well to philosophy and to the impact on philosophy of science. William James and Peirce, both important philosophers of science and its methods, were his friends. The founders of American pragmatism shared with Holmes and other young Bostonians the delights of the Metaphysical Club, a philosophical society founded in 1870, or thereabouts, to discuss "none but the tallest and broadest questions."<sup>9</sup> The development of science, and the ideas of Darwin and Huxley, were in the forefront of their thought. And, above all,

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8. HOLMES, *THE COMMON LAW* 1-2 (1881).

9. Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 *RUTGERS L. REV.* 425, 427 (1954).

by natural descent in the literature of law, Holmes and his fellow lawyers in the group were under the spell of Bentham, and the other Utilitarians, but especially of Bentham, that extraordinary figure, far in advance of his time, whose writings have not yet begun to exhaust their capacity to stir men to action.

Holmes' *Common Law*, and his other scholarly papers, proved to be genuinely fruitful and productive. They have contributed to all the streams of thought and debate which have so strongly colored the intellectual universe in which the modern American lawyer is formed. For sixty years, or thereabouts, following the publication of his book and his early articles, American law has been enlivened and illuminated by a Homeric series of debates addressed to the themes he had sounded.

The protagonists were a singularly colorful and often eccentric group of highly individual individualists. And their debate was lively, vigorous and usually very combative indeed. As Felix Cohen wrote, "In the lists of jurisprudence, the champion of a new theory is generally expected to prove the virtue of the lady for whom he fights by splitting the skulls of those who champion other ladies."<sup>10</sup> If you run over their articles and book reviews, in the bound volumes of the old law journals, you can still catch an authentic whiff of cordite. The contributors to the debate were, and some of them still are, a formidable lot, and I hope the next generation can produce their equals. The lists included Hohfeld and Walter Wheeler Cook, Bentley, Pound, Jerome, Frank, Kocourek, Underhill Moore, Oliphant, Dickinson, Llewellyn, Thurman Arnold, Radin, Yntema, both Cohens, Hutcheson, Goodhart, Arthur Corbin, McDougal and Lasswell, Fuller and Kantorowicz. Many words have been used to describe the attitudes towards law which were expressed and applied in the course of this debate: pragmatism and positivism; functionalism and institutionalism; realism and idealism; jurisprudence sociological, operational, gastronomic, non-Euclidean, transcendental; the jurisprudence of values, of skepticism, and of cynicism. On the whole, none of the labels is of much use in describing either the terms of the debate, or the prevailing state of thought which is its outcome.

I started by stressing a difference of view as to the place of legal rules in the legal process as the beginning of the modern American battle over the function and nature of law. The significance and propriety of these rules has remained a central issue in almost all phases of the discussion. The debate was part of a more generalized reconsideration of the respective roles of reason and nature in the process of learning, and in the creation of organized bodies of know-

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10. F.S. COHEN, *THE LEGAL CONSCIENCE* 77 (1960).

ledge. In the legal literature, as in the literature about the philosophy of science, the words "rule" and "reason," "fact" and "principle," were used in a bewildering variety of denotations, which added to the excitement, if not to the coherence of the argument.

There was a general atmosphere of skepticism, often of mistrust, as the reformers approached the citadel of the rules of law. They agreed, by and large, on two positions: first, that under legal customs all would accept, many, perhaps most of the cases which reached appellate courts could only be decided in one way; and second, that in many instances the judge had a significant range of choice in deciding the case: choice in finding the facts, which Judge Frank stressed, or choice among rules, and in their interpretation. As Cardozo put it in his classical Storrs Lecture at Yale:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart.<sup>11</sup>

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11. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-14 (1921).



In short, the judge is inevitably concerned with policy, since law is "a means to social ends, and not an end in itself."<sup>12</sup> He makes law, and does not merely find it.

Many of the writers who participated in the discussions concentrated on the artificial and unreal character of many legal rules. They were preoccupied with demonstrating that existing rules were meaningless, or circular, or self-contradictory, like the concept of "implied malice" which drew Holmes' scorn.<sup>13</sup> Some then went on, seeking to formulate new rules which would more accurately describe the law in action. Law, Sabine said, is "what it does,"<sup>14</sup> not what the judges say they are doing, or why. Others sought to investigate the effects of the existing law, as in court administration, bankruptcy, or divorce, or the relation between doctrines of law and patterns of custom or usage.

Many of the realists were heatedly accused of nihilism or worse, and charged with denying the generalizing element of law altogether. They were alleged to believe that decisions were based on unstated interests or value preferences, and that the reasons given for decisions were in fact after-thoughts, cynical rationalizations, representing the judge not as a conscientious lawyer, working within the permissible limits of his discretion, but as a willful autocrat. By and large (though with several exceptional and occasional aberrations) the charge was not justified: the realist literature agreed with Pekelis' striking remark, amending one of Holmes' most famous quips, that "concrete cases cannot be decided by general propositions—nor without them."<sup>15</sup> The realists—or most of them—were not trying to deny the inevitability of rules in a system of law that sought at any given time to decide like cases alike. What they were trying to achieve was an awareness of the relationship between rules and policy, viewing law as an instrument for social action in a society constantly in flux, "and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve."<sup>16</sup>

When all the rules were re-examined and reformulated, when everyone understood and accepted the tentative nature of rules, and their relation to the customs and morals of society, what then? Should modern lawyers, worthy to be welcomed as brothers into the fellowship of "Realism", "Liberalism" and "Enlightenment", devote

12. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

13. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); HOLMES, COLLECTED LEGAL PAPERS 117 (1920).

14. Sabine, *The Pragmatic Approach to Politics*, 24 AM. POL. SCI. REV. 865, 878 (1930). This view, essentially Gray's, was effectively criticized by Cardozo, *op. cit. supra* note 11, at 125-30.

15. PEKELIS, LAW AND SOCIAL ACTION: SELECTED ESSAYS 20 (1950).

16. Llewellyn, *supra* note 12, at 1236.

their attention to the law as it was at their moment of study, or to the law as it ought to be? In the early stages of the campaign, the rebels were anxious to concentrate — temporarily, in Llewellyn's phrase — on the law that was, and to set aside for the future the problem of the law that ought to be.<sup>17</sup> It was difficult enough, they thought, to show that the law recited in appellate decisions had lost contact with the mores of the community, and the law in action. The first job was to clear away the circular syllogisms and the meaningless concepts; to dispose of rules which had no other reason to support them than that so it had been in the time of an ancient Henry; and to annul, test, reformulate, and review all legal rules in the light of their factual background and effect.<sup>18</sup>

But was this the whole task of law and of legal scholarship? Was there no more to the lawyer's job than to see to it that the law corresponds to the felt needs of the community, and maintains adequate means for knowing such needs, through its use of analytic procedures, and of methods and data drawn from economics, political theory, psychology and sociology? Is the only end to be served that the law discover itself accurately, realistically, to make it the mirror of custom, rather than an instrument of higher values?<sup>18a</sup>

One of the most significant criticisms of the realist movement stressed this thought—that the realists denied the problem of judging the goodness or badness of law, beyond the single issue of the correspondence between the law in the books and the law in action: that is, between positive law and custom. Hadn't Holmes, following Bentham, laughed at the very idea of natural law, and favored the "separation" of law and morals?<sup>19</sup> Had he not said that justice was not his business as a judge, but only playing the game according to its rules? And did he not remark that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>20</sup>

There is a paradox in this charge against the modern movement in American thought about law, for the legal realists were among our most devoted and effective reformers, both of law and of society. Professor McDougal commented on the charge in these terms:

The American legal realism which Professor Fuller attacks is . . . a bogus American legal realism. John Austin, Kelsen, and others, from abroad and at home, may have done their bit to "separate the inseparable," but most of the men whose names appear upon Professor Llewellyn's famous list of American legal realists are innocent men. So also are

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17. *Id.* at 1223, 1236, 1254.

18. *Id.* at 1240.

18a. See note 1 *supra*.

19. See HOLMES, COLLECTED LEGAL PAPERS 310 (1920); BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT (1961).

20. HOLMES, COLLECTED LEGAL PAPERS 173 (1920).

most of their followers. They do not deny that the law-in-fact (rules and behavior) embodies somebody's ethical notions (how absurd it would be to deny it!); on the contrary, they are the people who have been most insistent that it has too often embodied an ossified ethics, inherited from previous centuries and opposed to the basic human needs of our time. More clearly than any of their critics, the realists have appreciated that legal rules are but the normative declarations of particular individuals, conditioned by their own peculiar cultural milieu, and not truths revealed from on high. Most of their writing has in fact been for the avowed purpose of freeing people from the emotional compulsion of antiquated legal doctrine and so enabling them better to pursue their hearts' desires. Not bothering them to explain how judges can legislate, it is they who have insisted that judges do and must legislate, that is, make a policy decision, in every case. The major tenet of the "functional approach," which they have so vigorously espoused, is that law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves. Any divorce they may at times have urged between *is* and *ought* has been underscored always as *temporary*, solely for the purpose of preventing their preferences from obscuring a clear understanding of the ways and means for securing such preferences. Directly contrary to Professor Fuller's charges, they have sought to distinguish between the *is* and the *ought*, not for the purpose of ignoring or dismissing the *ought*, but for the purpose of making a future *is* into an *ought* for its time.<sup>21</sup>

On the whole, Professor McDougal is right in his judgment, although there is a great deal on both sides of the debate about "the Law that is" and "the Law that ought to be" which is purely formal, inconclusive, and irrelevant.<sup>22</sup> There is more to modern American jurisprudence than the cheerful clatter of breaking idols, as we can see in the debate that is raging about the work of the Supreme Court.

Holmes had put his definition of law into the future tense. It was never enough, he said, to discover what the law really was at a given moment. What would it become tomorrow? What forces would influence the law to change, and what fruit would come of the process of change? To answer that question, Holmes urged with equal vigor, the lawyer had to understand and consider the ideas playing on the formation of law—the pressures for social change in many areas, from banking and bankruptcy to labor law and the law of torts. He had to master all the sciences of society, from anthropology to statistics. And he had to know the judges, their prejudices and predilec-

21. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941).

22. Insightfully reviewed in Jenkins, *The Matchmaker, or Toward a Synthesis of Legal Idealism and Positivism*, 12 J. LEGAL ED. 1 (1959); also treated in Rostow, *The Enforcement of Morals*, CAMBRIDGE L.J. 174, 185-92 (1960).

tions, their zeal to participate in the growth of the law, or to resist it. After all, Holmes spoke of law not only as a prediction of what the judges would in fact decide, but also as the "witness and external deposit of our moral life," and of its history as "the history of the moral development of the race."<sup>23</sup>

During the past twenty years or so, the stress in the American literature about law has been on this part of the equation—the quest for standards and values in the process of guiding the evolution of "the law that is" into the law we think it ought to become. The formulation and acceptance of ends, these writers know, helps to fix the line of growth of the law. Of those who have contributed this panel to the body of our thought about law, I might mention particularly Felix Cohen, F.S.C. Northrop, Messrs. Laswell and McDougal, Henry Hart, Friedrich Kessler, Jerome Hall, Lon Fuller and Edmond Cahn. Their work has helped to correct and offset the relative neglect of the problem of values which characterized the more positivistic outlook of the earlier legal realists.<sup>24</sup>

The emerging awareness of these three themes in their relations to each other constitutes a new synthesis of ideas about law, which tends to dominate the universe of American law today. (1) That synthesis accepts, and nowadays accepts without protest, the use of generalization, as a limited but essential part of the process of making legal decisions. (2) It stresses the links between the actual law and what Ehrlich and Northop, following Montesquieu, call the living law of society, the mass of its customs and usages, animated by the exisiting Spirit of its Laws, the norm for law towards which it seeks to move in its day to day processes of law making. This phase of the problem requires the lawyer and judge to go far beyond the traditional data of the law books, and to investigate the functioning of society, and the minds of men. And (3) it recognizes the necessity to acknowledge and to seek to define the standards of aspiration in the minds of judges and other law-makers which govern the development both of society itself, and of its Spirit of Law. Some identify this third element in the legal process, a culture's ideal for the future of its law, as "natural law," a phrase of many ambiguities, and seek to study it objectively, with all the apparatus of modern scholarship.

#### IV

This set of working rules about the nature and social function of law has certain corollaries for the profession of law. If a lawyer or a judge or a law professor understands law to be no more than a

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23. HOLMES, COLLECTED LEGAL PAPERS 170 (1920).

24. This theme in the American literature corresponds to a world-wide revival of interest in the problem of standards for law, stimulated by the problem of law under circumstances of Fascist and Communist dictatorship. See RADCLIFFE, *THE LAW AND ITS COMPASS* (1960).

beautifully articulated set of formal rules, derived from Blackstone and the dictionary, then he can be a good and conscientious lawyer by putting the right words in the right order, and turning the crank of logic to get the right result. The lawyer's duty has quite another connotation if he believes law to be the instrument through which a changing society seeks to express and fulfill its aspirations for justice. If the lawyer lives by a limited and old-fashioned version of legal positivism, he professes to leave "policy" changes, and their impact on law, entirely to others—to the legislatures, or the economists, or to the political process. A judge of this persuasion is suffused with a glow of satisfaction if he recites the received words in the received order, and obtains a result which seems to conform to the letter he has learned. If the result is contrary to what he thinks society regards as right, just and desirable, he may glow with extra pleasure, for to many devotees of law in this sense, nothing so demonstrates the rigor and value of the law as a harsh result.

If, however, the lawyer, judge, legislator or law teacher has absorbed the concept of law I have been trying to describe, he knows that he cannot escape so easily. He must live with uncomfortable thoughts. He sees every social conflict, every case, no matter how small, as an inseparable part of a larger whole. For him, each settlement, each decision, each opinion derives its validity and its legitimacy from his conscientious effort to make certain that it represents not only law, but good law. The lawyer, the legislator, the judge and the law professor have different functions, different degrees of discretion, different zones of choice. But they confront the same standard of duty and responsibility. The modern lawyer can find no workable boundary between law and policy, for he acknowledges law to be policy expressed in certain forms. His motto is Brandeis' remark, "No question is ever settled until it is settled right." For him, the sense of the profession, the sense which justifies it, and makes it worthy of his dreams, is precisely that it is and must be the appointed agency of our society's sense of justice.

If we look at the work of our profession, and at its influence on society and on the law, in the light of the standard whose development and acceptance I have been discussing tonight, to what conclusion are we led?

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First, what of the Supreme Court, our highest institution of law, which has been criticized recently, as it has been criticized throughout its history, as a partisan and arbitrary body, recklessly writing its own prejudices into the law? If I am right in my summary of the prevailing American view of law, and if that view correctly states what our society expects of its law, most of these criticisms stand revealed to be untenable, and mistaken.

I have discussed on other occasions some of the popular criticisms of the Court—that its powers of judicial review are undemocratic; that it is behaving as a legislative and not a judicial body in its interpretations of the Constitution; that it is going too far and too rapidly in its development of our law of civil rights; and that it is violating the Constitution by interfering with the constitutional prerogatives of the state governments. I shall not undertake here to repeat what I have said in those papers to defend the main lines of the Court's work, and to answer its critics in detail.<sup>25</sup>

I might, however, briefly discuss the most important recent attack on the Court, Professor Wechsler's Holmes Lecture at the Harvard Law School.<sup>26</sup> In that influential speech, Professor Wechsler advanced the view that in its recent work, and notably in some of its most important recent decisions, the Court has breached basic standards of judicial propriety, and wandered into the forbidden realm of decision by fiat. He implied that his approach could be resisted only by those "who, vouching no philosophy to warranty, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."<sup>27</sup> The nub of Professor Wechsler's argument, distinguishing political from judicial decisions, appears, I think, in this passage from his lecture:

All I have said, you may reply, is something no one will deny, that principles are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time. Politicians recognize this fact of life and are obliged to trim and shape their speech and votes accordingly, unless perchance they are prepared to step aside; and the example that John Quincy Adams set somehow is rarely followed.

That is, indeed, all I have said but I now add that whether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles

25. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573 (1958); Rostow, *The Court and Its Critics*, 4 SO. TEX. L.J. 160 (1959).

26. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3-48 (1961) [hereinafter cited as WECHSLER, with page references to the book].

27. WECHSLER 17.

imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?<sup>28</sup>

Some have found in the words and tenor of the lecture contradictions and obscurities, particularly with regard to the weight the Court should give in doubtful cases to the presumption of constitutionality, and to the contrary views of the legislators or executive officers whose decisions are being reviewed by the Court.<sup>29</sup> I do not deny that these ambiguities exist in the text, nor that they raise difficult problems. Moreover, I find that the concepts of "reason", "principle", "generality" and "neutrality" on which Professor Wechsler's argument depends are employed in several ways, and apparently derive from different definitions. They seem to apply an original philosophic system, which Professor Wechsler has not yet published, for analyzing the judicial process. Perhaps fair criticism of the premise and thesis of his Holmes' Lecture should wait on the appearance of Professor Wechsler's jurisprudential views, for the lecture is clearly part of a much larger whole. It was also, however, an act of current significance in the formation of thought. We must do our best, therefore, as is so often the case, to try to reconstruct the mastodon from the few bones and teeth which happen to be on hand. The task is somewhat simplified by the availability of an approved gloss. Professor Wechsler has agreed with the reading given his lecture by Professor Henkin in a recent paper, and I shall start at least by examining that interpretation of his words.<sup>30</sup>

To Professor Henkin, Professor Wechsler's text implies no more than the commonplace with which I began this analysis: that generalized rules are essential to the legal process in order to protect society against judicial partiality, and to assure that like cases be decided alike. As Professor Henkin says felicitously, in trying to restate Professor Wechsler's argument as "a call for principle," "one might do worse for the beginning of a definition than to suggest that judicial doctrine and principle are those reasons for reaching a result which can be stated in a judicial opinion."<sup>31</sup> If this is indeed an adequate reading of the lecture, Professor Wechsler's charge, backed by the high and deserved authority of his reputation, is a most

28. WECHSLER 21. See F.S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 34-40 (1959).

29. See Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller and Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960). See also the powerful article of Judge Clark and Mr. Trubek on the same themes, Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

30. Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 652-62 (1961).

31. *Id.* at 655.

serious one—that the Supreme Court is not behaving like a court at all, but is deciding similar cases differently, depending on whether favored or disfavored parties or interests are before the Court—parties or interests favored or disfavored, let us be clear, not because their positions should be considered different in fact and in law, but simply because the judges happen to be partisans of one, and not the other. The charge, in short, is that the judges are applying personal and idiosyncratic standards of policy in shaping the development of the law, and not their understanding of what the community's standards, stated in the Constitution or the statutes, have become. In a recent article, Dean Griswold, while not committing himself to Professor Wechsler's view, has carefully indicated that he regards the question as an open one:

If decisions are reached on the basis of "absolute convictions" rather than through the painful intellectual effort of judgment in the light of the law, then the judicial process is not in its finest flower. . . . Though it is clear that judges do "make law," and have to do so, it remains the fact that this is, at its best, an understanding process, not an emotional one, a self-effacing process, not a means of vindicating "absolute convictions." It is a process requiring great intellectual power, an open and inquiring and resourceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them. If one regarded himself as having a special mission to fulfill, or if he were quite largely the prisoner of his absolute convictions, he would not meet the highest standards of judicial performance. When decisions are too much result-oriented, the law and the public are not well served. . . .

Our judges carry a heavy burden. They make a supreme contribution in our society. They are entitled to our thoughtful and respectful consideration as they carry out their difficult task of disinterested exposition and development of the law of the land.<sup>32</sup>

To me, Professor Wechsler's lecture—though not Dean Griswold's comment on the issues raised in it—represents a repudiation of all we have learned about law since Holmes published his *Common Law* in 1881, and Roscoe Pound followed during the first decade of this century with his path-breaking pleas for a result-oriented, sociological jurisprudence, rather than a mechanical one. It would raise the element of rules, of precedent, of what he calls "principle" or "reason" in the judicial process to a position of absolute primacy which all we know about law denies.

In this regard, Professor Wechsler goes well beyond Professor

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32. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 93-94 (1960).



Henkin's reassuring interpretation of his lecture. For Professor Wechsler, unlike Professor Henkin, would require opinions of a defined kind and quality in every case, or have the Court abstain from action—presumably leaving in effect lower court opinions, or actions of other branches of the government which might have even less legal justification. And Professor Wechsler's criteria for the goodness of an opinion are more categorical than those suggested by Professor Henkin.

For this reason, as best I can read his text, I conclude that Professor Wechsler's argument is an attack on the integrity of the Supreme Court. For him, a decision has "any legal quality," which I interpret to mean "legitimacy," only if it is "entirely principled," that is, only if it "rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>33</sup> The quality of "legal quality" (or legitimacy) seems to be sharply different in Professor Wechsler's system from simple error, taken for granted as a normal and inevitable feature of the legitimate judicial process.<sup>34</sup> And it emerges as a curiously shifting and elusive entity, to be recognized intuitively, and then only by some. According to Professor Wechsler's rule, a judicial decision must be branded illegitimate, and condemned to limbo, if two conditions are satisfied: (1) if the Court fails to give a satisfactorily reasoned explanation of its result in terms of neutral principles; and (2) if the Court could not have given such an explanation, that is, if no one outside the Court succeeds, presumably within a reasonable interval of limitation, in advancing suitable reasons of principle to account for the Court's decision. But how can we tell that "no one" has given or can possibly give an account of the decision which meets the standard? The judges, presumably, have tried, although they would hardly agree with Professor Wechsler's verdict of failure.

Professor Wechsler illustrates and applies his test in his discussion of three recent cases, which represent some of the Court's most important modern work.<sup>35</sup> These cases, he says, "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."<sup>36</sup> But in these cases Professor

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33. WECHSLER 27. See also, WECHSLER 21-23.

34. I may be wrong in reading Professor Wechsler's text as so sharply distinguishing "legal quality" from the commonplace of error, or of poor opinion-writing. Despite his patient and generous efforts, in conversation and in letters, however, I find it impossible to read the lecture otherwise, for (quite apart from the language he uses) the tenor and sequence of his argument seems to attach far more drastic consequences to decisions and opinions lacking "any legal quality" than to those merely in error (see, e.g., his comment at pp. 35-36 that while Mr. Justice Holmes' "clear and present danger" test failed as analysis, one must respect it as an attempt to develop a principled delineation of the problem).

35. *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954).

36. WECHSLER 37.

Wechsler believes that the Court did not advance "clear" reasons of principle to defend its decisions;<sup>37</sup> and, by earnest effort, he has failed to adduce satisfactory rationalizations for the decisions himself.<sup>38</sup> Therefore, in his view, the choices of other branches of the government should have been allowed to survive,<sup>39</sup> since the presumption of constitutionality was not overcome. The results he applauds should have been achieved by political and not by judicial means. The decisions were not merely erroneous, but lacked legal quality. They represent *ad hoc* and unprincipled decision making, and the Supreme Court as an unprincipled power-organ.

We are left with the cold but correct proposition that we should obey an erroneous construction of the law—even one lacking legal quality—until it is changed, by reason of our general duty to obey the law in a *Rechtsstaat*.<sup>40</sup>

I do not have the same difficulties Professor Wechsler has in fitting these cases, hard as they are, into perspectives of constitutional development. Many of the Socratic questions he poses by way of criticism seem easy to answer, or to leave for a future court, in accordance with the habits of the common law. For example, the impact of Court-enforced racial covenants on land-use, affecting the social and political lives of whole communities, strikes me as readily distinguishable from purely private utilizations of property, and hardly alien to traditional "public policy" limits on one's freedom to use or dispose of his own. But others have dealt with Professor Wechsler's treatment of these cases.<sup>41</sup> In this lecture, I shall address myself to his premise: even if we were to conclude, as he does, that the opinions in question are inadequate or unsatisfactory, does it follow *for that reason* that the decisions were not only erroneous, but that they lacked "legal quality," and that the act of making them was a usurpation of power?

For me, Professor Wechsler's view is much too narrowly based. Even the task of reaching the conclusion that a Court's decision is

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37. WECHSLER 34. The requirement that the courts "impose a choice of values on the other branches or a state, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear," is one of the most dangerous standards for judicial action in the lecture. Clear to whom? The dissenting justices? It does no service to judges whose most routine tasks imply difficult analyses of complex factual situations, the evaluation of converging and competing interests and values, and the ordering of all the other forces which affect the growth of the Constitution, to tell them that they cannot act unless all becomes "clear." See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 214-15 (1952); C. L. BLACK, JR., *THE PEOPLE AND THE COURT* 13 (1960).

38. WECHSLER 47.

39. WECHSLER 27.

40. WECHSLER 47. See RADCLIFFE, *THE LAW AND ITS COMPASS* 82 (1960).

41. See, e.g., Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); C.L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). See Henkin, *op. cit. supra* note 30, at 635, 661-62.

erroneous calls for a far deeper and wider appraisal of the policies it represents, and of their alternatives, than a verbal analysis of the opinion as a piece of literature or rhetoric. And it takes much more, in the light of what we know of the historical limits of the judicial power, to conclude that an erroneous decision, or a decision defended by an inadequate opinion, is *ultra vires*.

Speaking of the generalizing, propositional element in law, Pound wrote—and I repeat what I quoted earlier—that law is “a reasoned body of principles for the administration of justice . . . a means towards an end, and it must be judged by the results it achieves . . . , not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.”<sup>42</sup> Of course we should all prefer the Courts to write clear, coherent and persuasive opinions, strictly disciplined by what Dean Griswold rightly calls the “tightly guided process” of the judicial tradition. Of course we want our judges to be impartial, detached, and mindful of the limits of their discretion, as well as conscientious in discharging the burden and responsibility which that discretion imposes upon them. In this connection I often think with admiration and respect of the fact that Mr. Justice Brandeis, for all his convictions about the “curse of bigness,” never wrote an opinion in the government’s favor in an antitrust case.

But, if we know anything at all about law, we know that the goal which Professor Wechsler makes his only test for judicial propriety is impossible to achieve; that it never has been achieved by any common law court, nor by any other Court; and that it never can be achieved, in the nature of the judicial process. It is the essence of our system of law that we require our judges to do their best to make their decisions in conformity to the rules of judicial action, with great deference to the past, and a strict sense of the boundaries of their power. And, for reasons which go deep into our history, we require them in most cases, but not in all, to write opinions conforming to standards which tradition has established for that exacting art.

Any lawyer who has worked through a line of cases about easements or trusts or bills and notes or any other legal subject, knows that no court has ever achieved perfection in its reasoning in its first, or indeed in its twentieth opinion on the same subject. Law professors make their modest livings in large part by dissecting judicial opinions, and helping their students to see how imperfectly most of them satisfy Professor Wechsler’s rule, and other, even more important standards for the evaluation of judicial action. In the nature of law as a continuing process, constantly meeting the shocks of social change, and of changes in people’s ideas of justice, this

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42. Pound, *supra* note 2.

characteristic of law must be true, even for our greatest and most insightful judges. They grapple with a new problem, deal with it over and over again, as its dimensions change. They settle one case, and find themselves tormented by its unanticipated progeny. They back and fill, zig and zag, groping through the mist for a line of thought which will in the end satisfy their standards of craft and their vision of the policy of the community they must try to interpret. The opinions written at the end of such a cycle rarely resemble those composed at the beginning. Exceptions emerge, and new formulations of what once looked like clear principle. If we take advantage of hindsight, we can see in any line of cases and statutes a pattern of growth, and of response to changing conditions and changing ideas. There are cases that lead nowhere, stunted branches and healthy ones. Often the judges who participated in the process could not have described the tree that was growing. Yet the felt necessities of society have their impact, and the law emerges, gnarled, asymmetrical, but very much alive—the product of a forest, not of a nursery garden, nor of the gardener's art.

Often, of course, the structure and content of a court's opinion can be explained by the debates of the judges who must vote on it. One is an enthusiast for one principle, others for another. The human process of persuasion within an appellate court accounts, as we know, for many anomalies and worse in the final published version of a court's views.

Beyond these normal problems of intellectualizing the judicial process—problems of insight, scholarship, and policy—there are special pressures which are strongly felt by the Supreme Court of the United States. Exercising high political powers, the Court must have a high sense of strategy and tactics. Its influence on our public life depends in large part on the Court's skill in advocacy, and its sensitivity to the powerful forces which from time to time, in different combinations, must resist its will. When the Court decides to accept or reject cases, to decide them on this ground or that, to issue warning dicta which are then not made the basis for decision, it is necessarily performing a function far more complex than Professor Wechsler's call for candor in meeting *every* issue in *every* case on the basis of neutral principles of adequate generality. If the Court had in fact lived by Professor Wechsler's rule, it would have disappeared long since from the stage of American life. The great Chief Justice, John Marshall, is the classic exemplar and exponent of political prudence in the employment of the Court's powers. Wisely judging the strength of the conflicting forces whose conjuncture influences the growth of the law, carefully husbanding the Court's strength for the crucial issues, shrewdly choosing among alternative possible premises for its opinions, he still had the energy, vision and courage to make the

written Constitution into the constitution-in-fact for a nation. His opinions were a powerful educational force in the dialogues of the community, his decisions the walls, foundations and boundary lines of an heroic architectural plan. But few of them can be described as full and direct answers to every problem presented by the cases before the Court.<sup>42a</sup>

For the last thirty years, the Supreme Court has been dealing with a rising tide of new demands, and new problems. Our society has lived through a grinding depression, two wars, and the difficult and novel strains of the Cold War. It has maintained a large military establishment in times of nominal peace. And, most important of all, it has been called upon to make good the promises we made to our Negro citizens almost a hundred years ago, at a time when the place of the Negro in our society has been revolutionized, and the problem of race relations has taken on momentous contours in the setting of world politics.

The Court has been struggling with the judicial problems cast up by these events, with varying degrees of success. No student of its work could agree with all its decisions, nor with all the opinions written to explain them. Certainly I do not. I have criticized both the results and the opinions in many of its cases. But I should deny that the present Supreme Court is doing the expository, opinion-writing part of its job any worse, or any better, than most of its predecessors. By my lights, many of its opinions, and of its decisions too, are quite human and erratic variations on certain themes. But behind the variations, it is not hard to see the long-term trends. These long lines of constitutional development, I believe, are entirely in the spirit of our constitutional tradition. They represent the honorable attempt of honorable judges, sensitive to their calling, to do their duty as judges, not as legislators or as rulers by fiat. I stress that the work of the Court is work in process, and that the positions it takes today will not necessarily be those it takes tomorrow. So it was in the time of Marshall and Taney and Hughes. And thus it must always be, so long as we elect to make the judicial process of Anglo-American tradition one of our chief means of self-government.

The opinions of Marshall, and of every other strong judge who has sat on the Court, have been criticized in exactly the terms Professor Wechsler uses. Generations of writers about law, and of law teachers, have dissected the erratic reasoning of *Marbury v. Madison*, and discovered that the statutory construction on which *Gibbons v. Ogden* rests is artificial and strained. So be it. It is too bad. It would be much better if our judges could consistently write con-

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42a. The prudential factors in the choice of cases, and of grounds for decision, are realistically canvassed in Bickel, *Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 42-51 (1961).

vincing opinions, which earned an "A" by Professor Wechsler's rule; it would be better still if they reached the results of "good law" in all cases, whether through peccable or impeccable judicial opinions. But no human beings, not even law professors, could possibly bring such instantaneous order to the swirling freshets the judges must confront every day of their lives. As Fifoot wrote recently, reviewing the development of certain judicial doctrines and of theories about them in nineteenth century England, "[f]aced with the fragments of life, the current law of any place and time can but approximate to a principle or indicate a tendency."<sup>43</sup> We must accept the fact that under the best of circumstances honest judges, working within the boundaries of their power, and strictly according to the customs of their calling, will often write opinions which will fail to convince many, or all, or the best lawyers of their time, or of later times. Their decisions may nonetheless turn out to have been right or wrong, with the benefit of hindsight, — in error, or in creative anticipation of a principle theretofore unsensed. In the nature of the judicial process, Professor Wechsler's rule puts unwarranted and misleading stress on one phase of the judicial craft—a vital phase, but decidedly not the whole of it, nor even its most important feature.

Having said this, I should go one step further. I should be the last to deny the importance of the analytic process in the workings of law. But there is an inescapable Bergsonian element of intuition in the judges' work—in their ordering of "facts," in their choice of premises, in their reformulation of the postulates we call "rules" or "principles," in their sense of the policy or policies which animate the trend, or change it. These are the secret roots, as Holmes said long ago, "from which the law draws all the juices of life." They may be, as he said "the unconscious result of instinctive preferences and inarticulate convictions,"<sup>44</sup> but in the end they must rule. This is not to say that the law is "a mass of unrelated decisions" or "a product of judicial bellyaches."<sup>45</sup> The force of law as a system and tradition is and should be great, in defining the scope of judicial discretion. The judicial process and the academic study of law alike become mature and responsible when both judges and academic students of the law acknowledge the legitimate interplay of these factors in the act of decision, and seek to deal with them as functionally, and as directly, as the state of our knowledge permits.

If Professor Wechsler uses the words "principle," "general principle" and "reason" to mean the reasoning of judicial opinions which

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43. FIFOOT, *op. cit. supra* note 6, at 56.

44. HOLMES, *THE COMMON LAW* 35-36 (1881). This central feature of the judicial process is briefly summed up in Corbin, *The Judicial Process Revisited: An Introduction*, 71 *YALE L.J.* 195, 199-201 (1961), and discussed more fully in Clark and Trubek *supra* note 31 at 257-76.

45. F.S. COHEN, *THE LEGAL CONSCIENCE* 70 (1960).

convince some, or all, or only one good lawyer, in what sense can it be said that this requirement carries with it a requirement of "neutrality" as well?<sup>46</sup> Neutrality, perhaps, in the spirit of Anatole France's remark that in the eyes of the law the rich and the poor are under an equal duty not to sleep beneath the bridges of Paris. Neutrality, of course, in the sense that judgment should not be biased by fear, or bribes, or, most important of all, by the lively political expectation of votes or favors to come. If this is all "neutrality" means, then it is hard to see what all the fuss is about. Professor Wechsler's notion of neutrality seems to go further.

Could it mean that Marshall's major premise in approaching any constitutional question—that the Constitution he was interpreting was the blueprint for a nation, not for a confederation of sovereign states—was not a permissibly "neutral" principle? Professor Wechsler does not clearly indicate whether strongly held views of this order about constitutional principles qualify as "neutral," save in his passing comment on the "preferred position" controversy.<sup>47</sup>

There is another possibility. Does Wechslerian "neutrality" mean that in construing the Constitution the justices should never declare statutes or administrative action invalid, unless their action satisfies a standard which cannot be met? Is it the doctrine of judicial self-restraint carried to the point of complete passivity? Would it deny all visible autonomous discretion to judges who have been entrusted by history with the power to interpret and apply the Constitution as law, in the setting of law suits? Does it mean that in their essential task of discrimination—that is, of deciding when situations should be treated differently by the law, — the judges should disregard inequalities of bargaining position, or in voting power; that the protection of individuals and minorities against transitory majorities cease to be the dominant theme of the Bill of Rights; that in reconciling the competing claims of different parts of the Constitution, the Court not be required or allowed to decide, to recall the theme of a recent Coen lecture, whether in a given instance, and in the absence of statutory guidance, the Constitutional interest in a fair trial outweighs in constitutional importance the constitutional interest in a free press? It is difficult, at least it is difficult for me, to determine how Professor Wechsler would answer these questions. But doubts of this order as to his meaning remain after many readings of his lecture.<sup>48</sup>

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46. Professor Wechsler concedes the ambiguity of the word, but defends the choice of an enigmatic word for an enigmatic subject. WECHSLER xiii.

47. WECHSLER 35. See, however, Henkin, *op. cit. supra* note 30, at 658-60.

48. Professor Wechsler does not, of course, favor a static Constitution, bound to constructions prevalent in the 18th century. He welcomes the process of adaptation and growth in the interpretation of constitutional provisions, so long as that process is controlled by the criteria he advances. WECHSLER 22-26, 32-36.

Criticisms like those we have been considering do not detract from the greatness of the work Marshall did. Nor should they be considered to detract from the achievements of our Court today. "The life of the law has not been logic: it has been experience." That is the hard lesson Professor Wechsler has forgotten. His test does justice to neither aspect of the process of law. On the side of experience, Wechsler would deny the propriety of judgment, which Cardozo made his central theme; and his view of "logic" represents an inadequate and rudimentary notion of the philosophy and methods of systematic thought.

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If we turn for a moment from the Supreme Court to other institutions of the legal profession, and seek to look at them in the perspective of the standard I have sought to define, what findings are indicated? One could examine the work of lawyers and of law professors. But, for reasons of mercy in testing your patience, I shall comment tonight on only a few aspects of the work of the organized legal profession.

The national, regional and local bar associations, the American Law Institute, and the American Bar Foundation are developing rapidly. In the main, they are no longer merely social clubs, or trade unions, concerned with fighting off competition from the accountants, trust companies and insurance agents. They have sponsored important research reports, like those of the Association of the Bar of the City of New York, and the studies of the American Law Institute. They have engaged in a variety of desirable programs for the advanced professional training of lawyers. And they have participated in some efforts at law reform, most notably those in the field of procedure and judicial administration, and in efforts to raise the standards of judicial appointment.

While much useful work has been done, and many promising initiatives are being undertaken, I think the disinterested observer must conclude that as yet the legal profession has not begun to fulfill its obligation to society as an effective force for the vindication and improvement of law.

Let me mention a few items of unfinished business as examples of the kind of issues we must face as lawyers if we can hope to justify ourselves to society. Our arrangements for providing legal aid to the poor, both in civil and criminal cases, are in most communities lamentably inadequate. The present state of legal aid programs is a standing reproach to the legal profession. In most states, the quality of judges is only fair. The practice of electing judges, or of appointing them for limited terms, survives in most of the states, a serious barrier to the possibility of truly impartial justice. In many,



many communities, the judicial "fix" is reported to be commonplace—a disgrace we have tolerated far too long. In the field of procedure, despite the progress made under the federal rules, and their analogues in many states, we still find indefensible delays in courts, cases shuttling back and forth between courts, and masses of decisions on purely procedural points which deny the very premise of procedural reform. Our police practice, and our procedure in criminal cases, are being slowly improved, thanks to the vigilant oversight of the Supreme Court in this field. But the process of reform still depends far too much on the accident of litigation, rather than on the affirmative efforts of bar associations, legislatures and judicial councils to bring existing practice up to the standards announced by the Court. Far too little is being done to improve and reform substantive law. The enactment of new corporation laws and codes of correction, and the progress of the Commissioners of Uniform State Laws highlight as exceptions the slow movement in this area, and the weakness of national efforts for improvement.

Beyond issues of this order, typical and general as they are, there looms a far more serious and fundamental criticism of the performance of our bar, and of our law schools.

At the present time we are witnessing and enduring a sinister challenge to the authority of law in our society. In many parts of the South, governors and legislatures openly defy the courts of the United States, and seek by one subterfuge after another to prevent the orderly enforcement of the fourteenth amendment. These efforts are supported by private groups, operating both publicly and in secret. They employ boycotts, intimidation and open violence to prevent Negroes from enforcing their legal rights, and to weaken and disperse those within the decent and law-abiding majority who are trying to uphold the purposes of the law.

Thus far, so far as I know, the organized bar, save for a few notable exceptions, like that of the Houston Bar Association, has stood silent, and walked by on the other side. It helped to repel the dangerous attacks on the jurisdiction of the Supreme Court, mounted several years ago by Senator Jenner of Indiana, and others. But it has done nothing more affirmative to assist the courts and the nation in dealing with our crisis of legality. When explosions of mob violence occurred in New Orleans last fall, as they had occurred earlier in Little Rock, I do not recall seeing photographs of leading lawyers, or Bar Association Presidents, standing with the few children, parents and ministers who braved the threats and insults of the mob. Nor do I recall public statements from the leaders of our profession, since the time of Senator Pepper's appeal in 1956, urging public support for the law, and willing compliance with its obvious purpose.

With lonely splendor, the federal judges in the South have been doing their duty under circumstances of appalling difficulty. The law of the nation, which no majority would overturn, conflicts with the prevailing customs of a region of the nation. This fact presents a difficult, but by no means an unknown problem in the experience of law. The federal judges in the South have proved themselves worthy of the finest traditions of our legal system. Many of them, I assume, might not have voted with the Supreme Court, had they been its members when the segregation cases came up for decision. That possibility makes their conduct now doubly noble. Their courage and devotion in upholding the law, in the face of rancorous and bitter hostility in their own communities, has written a proud page in our legal history.

These judges deserve more than our praise from safe and distant places. We—we, the bar, and we, the American public—have left them too long alone in the line of battle. As Governor Collins of Florida has repeatedly urged, public opinion should be effectively mobilized and brought to bear, if we are to remain a community of law. The profession of law has a plain duty to lead in the effort to recreate a climate of legality in our society. I hope that our new President will soon do what only a President can do in galvanizing American opinion. And I wonder whether it would be useful for Congressional Committees to investigate some of the really gross activities which the White Citizens' Councils and their allies are carrying on throughout the South. I make the suggestion as one who believes in preserving broad powers of investigation for the Congress, as the Grand Inquest of the American people. At the same time, I have been, and I am critical of many features of the record. Many of the investigating committees which have sought to expose Nazi and Communist activities during the last twenty-five years have done questionable jobs, with extremely high costs in intimidation. But I am reluctant to believe it is beyond the will and wisdom of our law to devise fair procedures for legitimate enquiries into alleged patterns of coercive behavior which fall outside even the most latitudinarian concept of legitimate political activity. In this perspective, I submit that if any activities deserve to be called "subversive" and "Un-American," those carried on by the White Citizens' Councils and kindred groups surely qualify. What could be more alien to our constitutional tradition than the work of organized bodies which seek to thwart the writ of the courts; to drive from their jobs and homes people whose only offense is to believe in the law; to close the public schools, and destroy the basis of modern democratic society?

The challenge to social order implicit in this situation is more than the negative one of ending active resistance to the law. The

formal law of equality has been growing steadily in the United States for two generations, case by case, statute by statute, executive order by executive order. It has been nourished by the social advance of the Negro in our society, and it has helped to make that advance possible. We know that in many areas the law in fact—the living law—does not yet match the precepts announced by the Supreme Court as the law of the fourteenth amendment. The problem is a national one, not a regional one. In some parts of the North there are virtual boycotts by banks or real estate agents which prevent Negroes and members of other minorities from buying homes of their choice. Such boycotts are almost certainly illegal under the Sherman Act, or under state laws against restraints of trade. The problem of assuring effective equality in voting, or indeed assuring the vote at all, is one in which practice is far behind the law, as the valuable work of the Civil Rights Commission has demonstrated. The same conclusion can be drawn, as we all know, in the field of employment opportunity, where, among many other barriers to equality, we still confront the phenomenon of “lily-white” trade unions.

The task of the profession in this area should be to lead, not merely to insist that the trickle of final decisions by the Supreme Court be obeyed. There is work to be done in every community, North and South, before we can begin to claim we are living up to our own standards. The task is urgent. Violence breeds violence. The Negro citizen has shown commendable patience, tolerance and faith in his quiet and disciplined demeanor in the South. But the rule of turning the other cheek is a hard one. It may not endure indefinitely if we fail to make the performance of our law match its professions.

In the end, however, the reasons which make action on this front a necessity are different. They are reasons of conscience, not of prudence. These things should be done not because they are politic, but because they are right.